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# Sustaining Discipline in a Post-Pandemic World

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**Michigan Public Employer Labor Relations Association**

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# ESTABLISHING A PRODUCTIVE WORKPLACE

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- Each party must be aware of the other's:
  - Expectations
  - Rights
  - Responsibilities



# WORK RULES: STANDARDS OF CONDUCT

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- Establish Proper Standard Of Conduct
- Maintain Discipline



# CONSISTENCY IS IMPORTANT

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- Inconsistent treatment leads to complaints of:
  - Favoritism
  - Discrimination (race, gender, sex, national origin, etc.)
- Failure to discipline consistently will result in:
  - Inability to enforce discipline through the grievance arbitration process
  - Claims of unfair or unlawful treatment
- Just Cause for discipline:
  - Burden on employer to establish the violation and that the discipline is appropriate
- Legitimate non-discriminatory business reason for discipline:
  - Burden on employer to establish the violation and that the discipline is appropriate



# **AVOID CLAIMS OF DIFFERENTIAL TREATMENT BY:**

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- Establishing written policies
- Applying policies uniformly and consistently
- Guard against overreacting
  - When in doubt, consult upper management/Human Resources



# ENFORCING WORK RULES: EMPLOYEE EXPECTATIONS

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- Know expectations
- Consequences of not meeting expectations
- Consistency
- Predictability
- Credibility



# EMPLOYEE EXPECTATIONS

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- Predictable treatment
- Responsible supervision
- Adequate job training and orientation
- Treatment with dignity



# EMPLOYEE EXPECTATIONS

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- Sound business management
- Information concerning the performance of the business
- Safe and healthy working conditions



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# MANAGEMENT HAS THE RIGHT TO EXPECT EMPLOYEES TO:

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1. Be on time
2. Attend regularly
3. Put in a full day's work
4. Be physically and mentally prepared for the task to be performed
5. Respond positively to direction
6. Learn the job at hand, and new jobs
7. Adjust to change
8. Get along with fellow employees
9. Know and follow the rules and regulations



# EFFECTIVE DISCIPLINE AND COACHING

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How to administer discipline for a positive workplace, regardless of whether there is a union involved



# REMEMBER... FOUNDATION

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- Establish proper standards of conduct
- Maintain and implement uniform, consistent discipline

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# USE YOUR RULES, POLICIES AND LABOR CONTRACT AS A DEFENSE

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- Policies: Clear in purpose, design, and intent
- Avoid words that create an entitlement – in everything
- Adopted policies, rules and practice should be consistent with the labor contract

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# USE YOUR RULES, POLICIES AND LABOR CONTRACT AS A DEFENSE

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- Apply uniformly
- Distribute to all employees intended to be bound
- Adequate notice to employees before being bound by new or changed policies
- Signed acknowledgment



# EVALUATING EMPLOYEE MISCONDUCT: SIX STEPS

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1. Notice (Labor Contract / Rules)
2. Related to Work
3. Investigation
4. Evidence
5. Even-handed/Consistent application (Labor Contract / Rules)
6. Penalty



## **EXAMPLE: INSUBORDINATION**

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- Employee is found wandering away from work station while on work time
- Supervisor instructs employee to return to work station and continue to work
- Employee ignores supervisor, states “I’m on break,” or outright refuses to return
- How would you handle this situation?

# EXAMPLE: INSUBORDINATION HANDOUT

- Is there a work rule/expectation that employees perform work while they're on the clock? **YES**
- Have you allowed other employees to wander away from their work station while on the clock and/or refuse a direct order to return? **NO**
- Is there any protected reason why the employee is behaving this way? (i.e., does the employee have an accommodation that allows unscheduled breaks? Is the employee engaging in other protected activity? Is there an immediate safety threat?)
  - If **NO**....

Communicate to the employee that “this is a direct order”:

- Ask - “Are you refusing a direct order to return to your work station?”
- If **YES**, move to discipline.

**Suspension pending advisability of discharge.**



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# FACTORS IN DETERMINING THE PROPER LEVEL OF DISCIPLINE

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- Seriousness of the misconduct;
- Strength of the evidence;
- Deterrent value of the discipline;
- Applicable disciplinary policies;
- Rehabilitation;
- Conformity with discrimination laws.



## EXAMPLE: INSUBORDINATION

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- Direct insubordination after a warning (“Are you refusing a direct order?”) is serious misconduct
- Were there any witnesses?
- Has this employee been insubordinate or engaged in similar misconduct before?
- What level of discipline has been given to other employees for insubordination?
- Will that same level of discipline teach THIS employee to correct his behavior?

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# ELEMENTS OF AN EMPLOYEE WARNING FORM HANDOUT

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- Rule violated
- Offense committed
- Penalty imposed
- How to avoid future discipline
- Warning of future discipline
- Signature of employee or notation of receipt



## EXAMPLE: INSUBORDINATION

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- Rule violated: Requirement to be at work station performing work while on the clock (cite rule if in handbook/CBA); requirement to follow direct work instructions (cite rule if in handbook/CBA)
- Offense committed: Employee was wandering away from work station while on the clock and refused a direct order to return to work.
- Penalty imposed: 1 day suspension
- How to avoid future discipline: In the future, employee should remain at work station performing work while on the clock and should comply with reasonable direct work instructions
- Warning of future discipline: Further violations of the rules violated here will result in termination of employment
- Signature/notation



# RISKS OF DISCIPLINE

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## Non-Bargaining Unit

- Discrimination and harassment claims
- Retaliation and whistleblower claims
- Employee morale issues

## Bargaining Unit

- Grievance/Arbitration
- ← All of the same risks

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# SUSTAINING DISCIPLINE OF BARGAINING UNIT EMPLOYEE

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- Effective grievance processing is key
- Attitude, judgment, experience and training is of prime importance
  - Take it seriously
  - Be patient
  - Be open minded
  - Be a good listener
  - Note what is being said, not the way it is being said
  - Don't get defensive
  - Don't get angry
  - Don't react to bad behavior (but calmly terminate the meeting if behavior crosses the line)

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# SUSTAINING DISCIPLINE OF BARGAINING UNIT EMPLOYEE

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- Effective Grievance Processing:
  - Don't hide information – be open and honest about your position and its basis
  - Don't disparage the supervisor, the employee, the employer, the union, or the grievance
  - If wrong, admit it, fix it, and move on
  - If right, calmly and firmly explain why
- The parties will not always agree
- Remember: A desire to resolve grievances, rather than to win them is essential

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# THE TYPICAL GRIEVANCE ARBITRATION PROCEDURE

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- **Grievance Definition** - Any dispute regarding the meaning, interpretation, application or alleged violation of the terms and provisions of the labor contract.
- **Step 1** - Verbal. Employee addresses issue with supervisor.
- **Step 2** – Written. May include meeting with steward and lower level management.

Grievances and responses should be thoughtful: explain grievance basis, explain basis for denial and, if resolved, document the settlement or resolution.



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# THE TYPICAL GRIEVANCE ARBITRATION PROCEDURE

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- **Step 3 – Written.** Usually includes union reps and higher level management.
- **Mediation / Grievance Panel** – Non-binding step, usually after step 3 but prior to arbitration, designed to achieve resolution prior to arbitration. Also disciplinary review boards / commissions in public sector.
- **Arbitration** – Final and binding, but can be appealed.



# ARBITRATOR SELECTION

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- **Importance of Selection** – One person judge and jury
- **Selection Methods** –
  - Mutual Agreement
  - Rotating pre-selected panel
  - Requested panel (FMCS, AAA, MERC) and striking



# ARBITRATION BURDEN DISCIPLINE OR DISCHARGE

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- Employer has the burden of proving cause.
- Arbitrator has the power to:
  - Sustain a discharge;
  - Overturn a discharge & reinstate the employee with backpay; or
  - Split the baby – modify the discharge & reinstate without backpay.



# THE SEVEN TESTS FOR JUST CAUSE:

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- Was the worker given advance warning of the probable consequences of his conduct?
- Was the controlling rule, order or standard reasonably related to efficient and safe operations?
- Was the alleged violation of the rule or order fully investigated before discipline?
- Was the investigation fair and objective?
- Did the investigation uncover substantial proof of guilt?
- Was the employer's treatment even-handed and non-discriminatory?
- Was the disciplinary action reasonable related to the worker's records and the gravity of the offense?



# HOW DO I RESOLVE A GRIEVANCE?

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## IN WRITING

- Specify the Parties
  - Union
  - Grievant[s]
  - Employer
- Clarify the dispute/issue
  - Is there an clear agreement on what the dispute/issue is?
  - If not, you cannot effectively resolve the dispute.
  - Do not talk past each other or try to hide the ball.

## BE CLEAR WITH ONE ANOTHER



# WHAT ELSE IS NEEDED?

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## IN WRITING

- Specify the resolution for the dispute issue
- Specify that the grievance is withdrawn / resolved
  - Is there an clear agreement on what the resolution is?
  - If not, you cannot resolve the dispute.
  - Do not talk past each other or try to hide the ball.

## BE CLEAR WITH ONE ANOTHER



# WHAT CAN BE IN A GRIEVANCE RESOLUTION?

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## ANYTHING THAT IS NOT ILLEGAL

- Exceptions to the labor contract
- Last Chance Final Warning – expiring or non-expiring
- Restrictions on future access to grievance arbitration procedure – fact of the occurrence only
- Consider precedent / prejudice – if there are concerns the resolution can be without precedent / prejudice
- Representation that the employee was fairly represented
- Waiver of seniority / all rights under the labor contract



## **MCLAREN MACOMB (07-CA-263041)**

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- Non-disparagement & Confidentiality provisions unlawfully restrain right to engage in protected activity
- Applies to union and non-union employees
- Add language to except activity protected by NLRA
- Remove “disparagement” - NLRA does not protect communications that are defamatory, reckless or maliciously untrue
- Specifically address confidentiality concerns
- What if the employee requests confidentiality?





## **MCLAREN MACOMB (07-CA-263041)**

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- Revisit your form agreements
- Tailor agreements to the specific concerns at issue
- If confidential, add disclaimer for protected concerted activity

### **Check before attempting to enforce existing agreements**

- If overbroad / in violation of the NLRA a ULP could be filed and monetary damages could be awarded – including attorney fees

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# SUSTAINING DISCIPLINE OUTSIDE OF THE GRIEVANCE PROCESS

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- No just cause standard – instead, must prove “legitimate non-discriminatory/retaliatory business reason”
- Best practices:
  - Investigate
  - Document



# PRE-DISCIPLINE INVESTIGATIONS

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- Why Investigate
  - Lessens disputes over what occurred.
  - Helps supervisors and HR make good decisions.
  - Creates a record to support decisions if challenged in an arbitration or lawsuit.
- When to Investigate
  - As soon as possible – get fresh facts from witnesses and complainant.
  - Witness statements taken at the time an event occurred carry more weight.
  - Get the relevant information before making a decision.
- What to Investigate
  - Poor performance or inappropriate behavior that violated a work rule.



# DOCUMENT THE INVESTIGATION

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- Describe the Conduct that Occurred
  - Third party who knows nothing about the incident, the business, or the employees can pick up the documentation and understand what happened.
- State the Steps Taken to Investigate
- Specify Violated Rules or Policies
  - Don't stretch – make sure the rule covers the issue.
- Name the Eyewitnesses
  - Don't rely on hearsay – “Joe told me that Jane said . . . ” – go talk to Jane!
- Take Witness Statements
- Review Finalized Report
- Sign and Date the Report



# AVOID OVERREACTING

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- When in doubt don't act before evaluating:
  - Protected status
  - Whistleblower / retaliation
  - Consistency with past actions



# EVALUATING MISCONDUCT

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## Improve Your Chances in Unemployment, Discrimination and Wrongful Discharge Cases

- Notice
- Related to Work
  - What about Misconduct away from Facility
    - Drug Use
    - Crime
- Investigation
- Fairness
- Evidence
- Even-handed/Consistent
- Penalty
- Suspension Pending Advisability of Discharge

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# FACTORS FOR DETERMINING PROPER DISCIPLINE LEVEL

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- Seriousness of the Misconduct;
- Strength of the Evidence;
- Deterrent Value of the Discipline;
- Applicable Disciplinary policies;
- Rehabilitation; and
- Conformity with Discrimination Laws

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# ELEMENTS OF EMPLOYEE WARNING FORM

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- Rule Violated
- Offense Committed
- Penalty Imposed
- How to Avoid Future Discipline
- Warning of Future Discipline
- Signature of Employee or Notation of Receipt





# SUSPENSION PENDING INVESTIGATION

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- When you absolutely can't wait to fire an employee:
  - Stop, Look & Listen
- Suspension Pending Investigation
  - Removes Offender as a Dynamic
  - Allows time to take Control of Situation
  - Allows time to Intelligently Gather and Evaluate Facts
  - Not Committed – Can Adjust Penalty
  - Permits development of a plan for resolution or termination



# PRE-TERMINATION PLANNING

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- Hiring and Onboarding
  - Set clear expectations and standards: attendance, performance, & ethics.
  - Ensure all material policies, procedures, & agreements are reviewed and signed.
- Consistency
  - Progressive Discipline vs. Serious Misconduct.
- Independent Review
  - HR and/or leaders independently review termination recommendations.
- Documentation
  - Memories fade, documents are forever.



# TERMINATION NOTIFICATION

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- Who
  - Terminated employee and HR representative.
  - Arrange for additional witness to be present – direct supervisor.
- What
  - Prepare documents in advance.
  - Give the real reasons for termination.
  - Let the employee talk.
- Where
  - Preferably in-person and private location.
- When
  - There is no “right” day of the week or time of day to terminate.



# Q&A

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